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In the Supreme Court of the United States

OCTOBER TERM 1954

No. 709

WILLIAM A. BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. i-x) is reported at 126 F. Supp. 190.

JURISDICTION

The judgment of the Court of Claims was entered on November 30, 1954. By order of the Chief Justice dated February 28, 1955, the time for the filing of a petition for a writ of certitorari was extended to and including April 14, 1955. The petition for a writ of certiorari was filed on April 8,

1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

QUESTION PRESENTED

Whether, under Section 5 of the Act of June 30, 1942, 56 Stat. 463, 465, which provided that naval personnel temporarily promoted should be entitled to the pay and allowances of the higher grade to which they were appointed "from the dates on which such appointments are made by the President," a Naval Reserve officer temporarily promoted to successive ranks on February 15, 1945 and October 5, 1945, with dates of rank respectively in 1942 and 1943, was entitled to the pay and allowances of the higher grades from the dates of the promotion orders or from the earlier dates of rank.

STATUTE INVOLVED

Section 5 of the Act of June 30, 1942, 56 Stat. 463, 465, provided as follows:

> Personnel heretofore and hereafter temporarily appointed pursuant to and as defined in the Act of July 24, 1941, * * * shall be entitled to the pay and allowances of the grade or rank to which so appointed from the dates on which such appointments are made by the President, and their appointments, unless expressly declined, shall be regarded for all purposes as having been accepted on the date made, without formal acceptance or oath of office.

STATEMENT

Petitioner was commissioned an ensign in the United States Naval Reserve on September 2, 1941,

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and was immediately called to active duty. He became a prisoner of war of the Japanese upon the surrender of Corregidor, May 6, 1942, and was liberated by American forces in Manila on February 4, 1945 (Finding 1, R. 29).

On February 15, 1945, petitioner was promoted to the temporary grade of Lieutenant, Junior Grade, to rank from October 1, 1942. On October 5, 1945, he was promoted to the temporary grade of Lieutenant to rank from November 1, 1943, and on the same date to the temporary grade of Lieutenant Commander to rank from October 3, 1945 (Finding 3, R. 29). On November 9, 1945, he was discharged from active service, effective at the end of his terminal leave, December 16, 1945 (Finding 4, R. 29). By order of the Board for Correction of Naval Records on February 28, 1948, petitioner's records were corrected to show that this release from active duty was effective March 16, 1946, instead of December 16, 1945 (Finding 7, R. 30).[1]

Petitioner was paid as an Ensign for the period from October 1, 1942, through September 1, 1944, as an Ensign with three years service for the period September 2, 1944, through February 14, 1945, as a Lieutenant, Junior Grade for the period February 15, 1945, through October 2, 1945, and as a Lieutenant Commander for the period from October 3, 1945, through the effective date of his discharge (Finding 5, R. 29-30).

Petitioner brought this action in the Court of

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[1] The petitioner was awarded pay for this period by the Court of Claims on November 6, 1951 (Finding 7, R. 30).

Claims on February 4, 1952 (R. 1), to recover the difference between the pay he received during the periods October 1, 1942—September 14, 1945, and September 15, 1945—October 2, 1945, and the amounts which would have been paid during those periods to a Lieutenant Junior Grade and a Lieutenant, respectively (Finding 8, R. 30). The Court of Claims found that he was not entitled to any pay in addition to that which he had received and accordingly dismissed his petition (Pet. App. pp. i-x).

ARGUMENT

Petitioner contends that when he received temporary promotions in 1945 he became entitled to the pay and allowances of the higher grades from the dates in 1942 and 1943 at which his rank in those grades was made to take effect. He was in fact paid for all periods of time throughout his service only the pay and allowances of the grade in which he was in fact at the time, and thus he received the higher pay and allowances only from the dates on which his promotions were actually made. He asserts therefore that there is due him the difference between what he had received and what he would have received had he actually served in the higher grades from the effective dates of rank.

1. Whatever the law might have been at times other than that here involved, it is clear that petitioner's promotions were made under the Act of July 24, 1941, 55 Stat. 603, as supplemented by the Act of June 30, 1942. As stated by the court below, the 1941 Act was intended "to provide a simple

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method of making temporary appointments in times of emergency and to replace the more cumbersome peacetime method of accomplishing the permanent promotion of officers by the selective process" (Pet. App. p. vi). It authorized the President to grant temporary promotions to both regular and reserve naval officers without the advice and consent of the Senate for all grades below rear admiral, and (Sec. 5) "in such numbers as [he] may determine that the needs of the service require."

Promotions under this Act were governed by the Act of June 30, 1942, 56 Stat. 463. In addition to suspending all existing laws relating to the permanent promotion of naval officers, the Act of June 30 provided in Section 5:

> Personnel heretofore and hereafter temporarily appointed pursuant to and as defined in the Act of July 24, 1941, * * * shall be entitled to the pay and allowances of the grade or rank to which so appointed from the dates on which such appointments are made by the President, and their appointments, unless expressly declined, shall be regarded for all purposes as having been accepted on the date made, without formal acceptance or oath of office.[2]

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[2] The term "temporarily appointed" in the Act of July 24, 1941, was expressly stated to mean also "temporarily promoted" or "temporarily advanced in rank." Sec. 2(a).

The Act of June 30, 1942, was repealed in large part, including Section 5, on August 7, 1947, 61 Stat. 880. Congress enacted a provision substantially identical in language to Section 5 on May 22, 1950, 64 Stat. 187 (34 U.S.C. 350k).

Thus the law under which all of the petitioner's promotions were made unequivocally provided that with each promotion, he should receive the pay and allowances of his new grades from "the dates on which such appointments are made by the President."

2. Petitioner seeks to avoid the force of this language by urging that the phrase "dates on which such appointments are made" is ambiguous and may have meant "dates of rank," rather than the dates of the promotion orders, and further that even if the language is clear, Congress did not intend such a result. Neither of these contentions can withstand examination.

(a) The statutory language, we submit, is clear and unambiguous. It makes the increased pay and allowances effective at the time when action is taken by the President. That action is taken only when he orders the promotion. If there was any doubt as to the meaning intended by Congress, it would be erased by the omission by Congress of the phrase "dates of rank," with which from time-honored use it was familiar. Indeed, Congress used this phrase "date of rank" in dealing with the appointment of reserve officers to the Regular Navy in Section 4 of the same Act of June 30, 1942:

> * * * each [reserve] officer so appointed to a grade above that of ensign or second lieutenant shall take precedence according to the date of rank stated in his reserve commission in the same rank.

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Thus, Congress was aware of the significance of the phrase, and its use of "dates on which such appointments are made" in Section 5 can hardly be presumed to be the result of unfamiliarity or oversight.

Moreover, the construction below accords with the express language of the provision which Congress, for the same reasons which motivated the passage of the Act of June 30, 1942,[3] enacted for Army officers on October 14, 1942 (56 Stat. 787, 10 U. S. C. 558).

> * * * every officer of the Army of the United States, or any component thereof, promoted to a higher grade at any time after December 7, 1941, shall be deemed for all purposes to have accepted his promotion to higher grade *upon the date of the order announcing it* unless he shall expressly decline such promotion, and shall receive the pay and allowances of the higher grade from such date unless he is entitled under some other provision of law to receive the pay and allowances of the higher grade from an earlier date. [Emphasis supplied.]

(b) Nor is there anything supporting petitioner's claim that Congress did not intend the critical language in the sense indicated by its clear meaning. The legislative history of Section 5 deals only

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[3] Compare House Report No. 2238, 77th Cong., 2d Sess., with Senate Report No. 1577 and House Report No. 2476, 77th Cong., 2d Sess.

with what, confessedly, was its primary purpose. In the case of many promotions, because of radio silence or other lack of communication with fighting forces, the officers concerned did not receive the information or the Navy Department was not notified of their taking the oath of office. If an officer was lost in such circumstances, his promotion never took effect, and he never became entitled to the pay and allowances of the new grade. The House Report indicates that Section 5 was intended to avoid such cases by eliminating the necessity for an acceptance or an oath of office. House Report No. 2238, 77th Cong., 2d Sess. Why Congress chose to posit the pay and allowances of the new grade from the date of appointment instead of the date of rank is not stated. In any event this much is clear: If Congress had intended that no officer should be deprived of a promotion because of a failure to take the oath of office, and that he should be entitled to the increased pay and allowances from his date of rank, then only that much of Section 5 as provides that "their appointments, unless expressly declined, shall be regarded for all purposes as having been accepted on the date made, without formal acceptance or oath of office" would have been necessary. If the first part of the section is to be given any effect at all, it must mean that an officer receiving a temporary promotion was entitled to increased emoluments only from the day his promotion was actually made.

(c) The interpretation of Section 5 by the court below has been the consistent view of the Navy,

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and Congress has not been unaware of of the administration of that provision with respect bect to prisoners of war. Indeed, several bills have ve been introduced in the last ten years to deal with ith the promotion of former prisoners of war and d would have required that the pay and allowances es pursuant to any promotion of such personnel be ret retroactive to their effective dates of rank. See *e.g.*, S., S. 1805, 79th Cong., 2d. Sess.; H.R. 52, 84th Cong.ng., 1st Sess., now pending. These bills would have ve achieved by Congressional action the result for fo former prisoners of war which petitioner here clai claims was required by Section 5 of the 1942 Act fo t for all Navy officers. However, only one of thes hese bills has passed both houses and that was veto etoed on June 14, 1946, on the grounds that "the mea measure is neither necessary nor in the national in interest." S. 1805, 79th Cong., 2d Sess., Sen. Doc. N. No. 205.

3. Similarly, petitioner's contentio itions are not aided by Section 2 of the Missing Pers ersons Act, 56 Stat. 143, as amended 58 Stat. 679, 50 U 0 U. S. C. 1002, which provides that any person in ac active service missing, interned, captured, beleague guered, or besieged, shall be "entitled to receive or t or to have credited to his account the same pay and a d allowances to which he was entitled at the begin inning of such period of absence or may become en entitled thereafter." That statute was clearly not not intended to give any right to missing persons whi which would be denied to others in active service. Sin Since no officer who received a promotion with a date ate of rank earlier than the date of his appointment nt was entitled to increased pay and allowances fron rom the earlier

date, the petitioner did not become so entitled because of his status as a prisoner of war.

The Court of Claims gave thorough and sympathetic consideration to the petitioner's contentions. Its interpretation of the governing statutes was based on their unequivocal meaning and a judicious refusal "to speculate as to the intent of Congress when the language of the act is clear." At the same time it did not ignore any overriding Congressional purpose which could be demonstrated. Its decision seems manifestly correct and does not call for review by this Court.[4]

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[4] The Court of Claims rejected the Government's contention that the action was barred by limitations. The petitioner was released from active service November 9, 1945, effective at the expiration of his terminal leave, December 16, 1945. The latter date was changed in 1948 to March 16, 1946. The action was brought on February 4, 1952. The court held that the six-year statute of limitations was tolled by Section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1179, 1181, as amended, 56 Stat. 769, 770 (50 U.S.C. App. 525), until the end of his active duty, and the court placed that at the end of his terminal leave, as corrected. We do not press this issue here, but we call the issue to this Court's attention, and note that the considerations giving rise to the Relief Act were not applicable to personnel on terminal leave, who were free to engage in civilian pursuits and unhindered in their participation in litigation. Especially is this so in the instant case as to the period December 17, 1945–March 16, 1946, since in fact during that period petitioner and the Navy regarded him as no longer in active service. It was two years later that the correction was sought and made, presumably for pay purposes, to extend petitioner's terminal leave to March 16, 1946.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1955.

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